IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
v.	:	Civ. Action No. 97CV00406 (Antitrust)
EZ COMMUNICATIONS, INC., and EVERGREEN MEDIA CORPORATION,	:	Received March 20, 1997 at 3:51 PM
Defendants.	:	N. MAYER-WHITTINGTON, CLERK U.S. DISTRICT COURT DISTRICT OF COLUMBIA

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Plaintiff filed a civil antitrust Complaint on February 27, 1997, alleging that a proposed swap and acquisition of radio stations in Charlotte, North Carolina between EZ Communications, Inc. ("EZ") and Evergreen Media Corporation ("Evergreen") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that EZ and Evergreen both own and operate numerous radio stations throughout the United States, and that they each own and operate radio stations in the Charlotte, North Carolina metropolitan area. The combined transactions would give EZ a significant share of the radio advertising market in the Charlotte

metropolitan area. As a result, the combination of these stations would lessen competition substantially in the sale of radio advertising time in the Charlotte metropolitan area.[1]

The prayer for relief seeks: (a) an adjudication that the proposed transactions described in the Complaint would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of such transactions; (c) an aware to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits EZ to complete its transactions with Evergreen, yet preserves competition in the market in which the transactions would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.[2]

The proposed Final Judgment orders EZ to divest WRFX-FM, currently owned by Evergreen. Unless the plaintiff grants a time extension, EZ must divest this radio station either within six months after the filing of the Complaint or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If EZ does not divest WRFX-FM within the divestiture period, the Court shall, upon plaintiff's application, appoint a trustee to sell the assets.

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[1]Prior to, and independent of, the transactions giving rise to this action, EZ and other radio station owners had announced plans to swap radio stations. The swap would have eliminated existing competition and resulted in EZ dominating the country format -- and its listeners -- and SFX Broadcasting Inc. dominating the rock format -- and its listeners. These transactions were abandoned following the Department of Justice's investigation into whether the
swaps were a device to allocate Charlotte's advertisers in such a way as to lessen competition between the two station groups. Therefore, it was not necessary to seek relief regarding these swaps in this Complaint.

[2]In a related transaction, American Radio Systems Corporation ("ARS") has agreed to acquire EZ through merger. Should the proposed merger be consummated, ARS will succeed to EZ's obligations under the proposed Final Judgment.

The proposed Final Judgment also requires EZ to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, WRFX-FM will be operated independently as a viable, ongoing business, and kept separate and apart from defendant EZ's other Charlotte radio stations. Further, the proposed Final Judgment requires defendants to give plaintiff prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of radio advertising time in Charlotte.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATIONS

A. The Defendants

Defendant EZ is a Virginia corporation with its headquarters in Fairfax, Virginia. It currently operates 23 radio stations throughout the United States, including two radio stations in Charlotte. In 1996 EZ reported revenues of approximately $14 million from its Charlotte stations.

Evergreen is a Delaware corporation headquartered in Irving, Texas. It owns and operates 41 radio stations nationwide, including five stations in the Charlotte area. In 1996 Evergreen derived approximate $22 million in revenues from its Charlotte stations.

B. Description of the Events Giving Rise to the Alleged Violations

On August 27, 1996, EZ entered into an agreement to swap two of its radio stations in

Philadelphia for five of Evergreen's stations in Charlotte, North Carolina. In addition, EZ agreed to purchase another Charlotte radio station from Evergreen for $10 million. The result of these two transactions, as is more fully discussed below, would be to give EZ a significant share of the radio advertising market in Charlotte, as well as a significant percentage of advertising directed to certain target audiences in Charlotte.

EZ and Evergreen previously have competed for the business of local and national companies seeking to advertise in the Charlotte area. Because the proposed transactions between EZ and Evergreen would have eliminated this competition, they precipitated the government's suit.

C. Anticompetitive Consequences of the Proposed Transaction

1. Sale of Radio Advertising Time in Charlotte

The Complaint alleges that the provision of advertising time on radio stations serving the Charlotte, North Carolina Metro Service Area ("MSA") constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. The Charlotte MSA is the geographical unit for which Arbitron furnishes radio stations, advertisers and advertising agencies in Charlotte with data to aid in evaluating radio audience size and composition. Advertisers use this data in making decisions about which radio station or combination of radio stations can deliver their target audiences in the most efficient and cost-effective way. The Charlotte MSA includes seven counties: Union, York, Cabarrus, Rowan, Mecklenburg, Lincoln and Gaston.

Local and national advertising that is place on radio stations within the Charlotte MSA is aimed at reaching listening audiences within the Charlotte MSA, and radio stations outside the Charlotte MSA do not provide effective access to this audience. Thus, if there were a small but

significant nontransitory increase in radio advertising prices within the Charlotte MSA, advertisers would not buy enough advertising time from radio stations located outside of the Charlotte MSA to defeat the increase.

Radio stations earn their revenues from the sale of advertising time to local and national advertisers. Many local and national advertisers purchase radio advertising time in Charlotte because they find such advertising preferable to advertising in other media for their specific needs For such advertisers, radio time (a) may be less expensive and more cost-efficient than other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); (b) may reach certain target audiences that cannot be reached as effectively through other media; or (c) may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media.. For these and other reasons, many local and national advertisers in Charlotte who purchase radio advertising time view radio either as a necessary advertising medium for them or as a necessary advertising complement to other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Charlotte, the existence of such advertisers would not prevent radio stations from raising their prices a small but significant amount. At a minimum, stations could raise prices profitably to those advertisers who view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media. Radio stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio stations can charge different advertisers different rates. Because of this ability to price discriminate between different customers, radio stations may charge higher rates to advertisers that view radio as

particularly effective for their needs, while maintaining lower rates for other advertisers.

2. **Harm to Competition**

The Complaint alleges that EZ's proposed station swaps and acquisition with Evergreen would lessen competition substantially in the provision of radio advertising time in the Charlotte MSA. First, the proposed transactions would create further market concentration in an already highly concentrated market, and EZ would control a substantial share of the advertising revenues in this market. EZ's market share of radio advertising revenues would increase to 55 percent after the proposed transactions. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Appendix A, EZ possesses a pre-transaction HHI of 2198, which would rise by 1440 points to 3638 after the transactions. This substantial increase in concentration is likely to give EZ the unilateral power to raise advertising prices and reduce the level of service provided to advertisers in the Charlotte radio market.

Furthermore, the proposed transactions would eliminate head-to-head competition between EZ and Evergreen for advertisers seeking to reach specific audiences. Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, inter alia, the size of the station's audience, the characteristics of its audience, and the geographic reach of a station's signal. Many advertisers seek to reach a large percentage of their target audience by selecting those stations whose audience best correlates to their target audience. Today, EZ's two stations and several of Evergreen's stations compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Charlotte, the stations are close substitutes for each other based on their specific audience characteristics. The proposed transactions would eliminate such competition, notably including competition of advertisers

seeking to reach male listeners in Charlotte.

Advertisers seeking to reach male listeners in Charlotte currently help ensure competitive rates by "playing off" Evergreen stations against EZ stations. Because the direct competition between the Evergreen and EZ stations would be eliminated by the proposed transactions, and because advertisers seeking to reach male listeners would have inferior alternatives as a result of the transactions, the transactions would give EZ the ability to raise its rates and reduce the quality of its services to some of its advertisers on its Charlotte stations. This is particularly true because of EZ's ability to charge different prices to different advertisers.

Format changes are unlikely to deter the anticompetitive consequences of these transactions. If EZ raised prices or lowered services to those advertisers who buy EZ and Evergreen stations because of their strength in delivering access to certain specific audiences, non-EZ radio stations in Charlotte would not be induced to change their formats to attract a greater share of the same listeners and to serve better those advertisers seeking to reach such listeners. Successful radio stations are unlikely to undertake a format change solely in response to small but significant increases in price being charged to advertisers by a multi-station firm such as EZ, because they would likely lose a substantial portion of their existing audiences. Even if less successful stations did change format, they still would be unlikely to attract enough listeners to provide a suitable alternative to EZ.

Finally, new entry into the Charlotte radio advertising market is highly unlikely in response to a price increase by EZ. No unallocated radio broadcast frequencies exist in Charlotte. Also, stations located in adjacent communities cannot boost their power so as to enter the Charlotte market without interfering with other stations on the same or similar frequencies, a violation of

Federal Communications Commission ("FCC") regulations.

For all of these reasons, plaintiff concludes that the proposed transactions would lessen competition substantially in the sale of radio advertising time in the Charlotte MSA, eliminate actual competition between EZ and Evergreen, and result in increased prices and reduced quality of service for radio advertising time in the Charlotte MSA, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in the Charlotte MSA. It requires the divestiture of WRFX-FM, Charlotte's most popular station among male listeners. This relief will reduce the market share in advertising revenues EZ would have achieved through the proposed transactions from over 55 percent to about 40 percent of the Charlotte radio market. The divestiture will preserve choices for advertisers and help ensure that radio advertising rates in Charlotte do not increase and that services do not decline as a result of the combined transactions.

Unless plaintiff grants an extension of time, EZ must divest WRFX-FM either within six months after the Complaint has been filed or within five (5) business days after notice of entry of the Final Judgment, whichever is later. Until the divestiture takes place, WRFX-FM will be maintained as a viable and independent competitor to EZ's other stations in the Charlotte MSA.

If EZ fails to divest WRFX-FM within the time periods specified in the Final Judgment, the Court, upon plaintiff's application, shall appoint a trustee nominated by plaintiff to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that EZ will pay all

costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of WRFX-FM, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment the trustee will file monthly reports with the plaintiff, defendant EZ and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished and (3) the trustee's recommendations. At the same time the trustee will furnish such report to the plaintiff and defendant EZ, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that defendants maintain WRFX-FM separate and apart from defendant EZ's other Charlotte stations, pending divestiture. The Judgment also contains provisions to ensure that WRFX-FM will be preserved, so that this station remains a viable, aggressive competitor after divestiture.

The proposed Final Judgment also prohibits EZ from entering into certain agreements with other Charlotte radio stations without providing at least thirty (30) days' notice to the Department of Justice. Specifically, EZ must notify the Department before acquiring any interest in another Charlotte radio station. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise under the Hart-Scott-Rodino ("HSR") premerger notification statute. Moreover, EZ may not agree to sell radio advertising time for any other Charlotte radio station

without providing plaintiff with notice. In particular, the provision requires EZ to notify the Department before it enters into any Joint Sales Agreements ("JSAs"), where one station takes over another station's advertising time, or any Local Marketing Agreements ("LMAs"), where one station take over another station's broadcasting and adverting time, or other comparable arrangements, in the Charlotte area. Agreements whereby EZ sells advertising for or manages other Charlotte area radio stations would effectively increase its market share in the MSA. Despite their clear competitive significance, JSAs probably would not be reportable to the Department under the HSR Act. Thus, this provision in the proposed Final Judgment ensures that the Department will received notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Charlotte market.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of EZ's proposed transaction s with Evergreen n Charlotte. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of defendants in the Charlotte MSA.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private

lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the plaintiff has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, NW; Suite 4000
Washington, DC 20503

The proposed Final Judgment provides that the Court retains jurisdiction over this action,

and that the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. Plaintiff is satisfied, however, that the divestiture of WRFX-FM and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Charlotte MSA. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.
>
> 15 U.S.C. § 16(e).

As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[3]

Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court in making its public interest finding, should...carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-

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[3] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although
the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues.
See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[5]

This is strong and effective relief that should fully address the competitive harm posed by the proposed transactions.

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[4]Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see BNS, 858 F.2d at 463;
United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. At 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

[5]United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd sub nom, Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky.
1985).

VIII. DETERMINATIVE DOCUMENTS

There are not determinative materials or documents within the meaning of the APPA that were considered by the plaintiff in formulating the proposed Final Judgment.

Respectfully submitted,

_____/s/_____
Dando B. Cellini

Merger Task Force
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.; Suite 4000
Washington, D.C. 20530
(202) 307-0829

Dated: March 20, 1997.

EXHIBIT A

DEFINITION OF HHI AND CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.

Certificate of Service

I, Dando B. Cellini, hereby certify that, on March 20, 1997, I caused the foregoing document to be served on defendants EZ Communications, Inc. and Evergreen Media Corporation by having a copy mailed, first-class, postage prepaid, to:

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_____/s/_____
Dando B. Cellini